

NO. 71416-3-I

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON

Respondent

v.

CLAYTON D. GERLACH,

Appellant

2015 JAN -7 AM 11:06  
COUNTY OF APPEALS DIVISION ONE  
STATE OF WASHINGTON  
*[Signature]*

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SUPPLEMENTAL BRIEF OF RESPONDENT

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## **I. SUPPLEMENTAL ISSUE**

1. Has the defendant sustained his burden to prove prejudice as a result of the entry of findings of fact and conclusions of law after bench trial while his case was on appeal?

## **II. SUPPLEMENTAL ARGUMENT**

CrR 6.1(d) requires the trial court to enter written findings of fact and conclusion of after bench trial. The purpose of written findings and conclusions is to ensure efficient and accurate appellate review. State v. Cannon, 130 Wn.2d 313, 329, 922 P.2d 1293 (1996). A court may enter findings and conclusions while the appeal is pending if the defendant is not prejudiced by entry of the belated findings. Id. The defendant bears the burden of proving any such prejudice. State v. Head, 136 Wn.2d 619, 625, 964 P.2d 1187 (1998). The court will not infer prejudice. Id. A defendant may be able to show prejudice when there is a strong indication that the findings ultimately entered have been “tailored” to meet issues raised on appeal. Id. at 624-625.

The defendant did not show prejudice from entry of late findings and conclusions when those findings and conclusions were consistent with the trial court’s oral decision. State v. Hillman, 66 Wn. App. 770, 774, 832 P.2d 1369, review denied, 120 Wn.2d 1011

(1992). This court also found a defendant failed to show prejudice where the defendant did not raise any factual challenge in his opening brief, and the late entry of findings did not prevent effective appellate review. State v. Vailencour, 81 Wn. App. 372, 378, 914 P.2d 767 (1996).

Here the defendant argues that he has shown prejudice due to tailored findings. He relies on authority finding no prejudice where the trial court's written findings track its oral decision. He points to the trial court's oral decision wherein the court did not recite any facts to support its conclusion that the defendant was guilty of burglary. He asserts that since the trial court did not orally state the facts it found, and did not state whether it was relying on accomplice liability to find the defendant guilty, the ultimate findings entered suggest they were tailored to the sufficiency of the evidence issue he raised on appeal.

Although the Court has found no prejudice where the court's written findings track its oral decision it has never found that written findings following an incomplete oral decision does result in prejudice. The Court indicated that any question of prejudice was to be evaluated on a case by case basis. Prejudice would not be inferred simply because findings were entered while the

defendant's case was on appeal. While it was possible to establish prejudice from tailored findings, the Court did not indicate that prejudice was probable or likely to be established under those circumstances. Under the facts and circumstances of this case the defendant has not demonstrated prejudice resulted from the late entry of findings and conclusions.

The evidence at trial was not disputed. The defendant testified that he was at Mr. Conner's home on the date and time that Mr. Conner reported that he was there. He agreed that he had contact with Mr. Conner before Mr. Conner went into his home. The defendant testified that he left in a hurry after his contact with Mr. Conner. 11/18/13 RP 117-118. The defendant did not remember honking his horn when Mr. Conner went to his home. Id. The defendant did not dispute that the Conner residence had been ransacked, or that a man was seen running from the Conner residence toward the defendant's car as the defendant was driving away. 11/18/13 RP 26-28, 31-39, 117-124.

The only contested evidence was whether the defendant picked someone up as he was driving away from Mr. Conner's residence. Mr. Conner testified that the defendant picked up an unknown person. 11/18/13 RP 26-28. The defendant testified that

he did not pick up someone as he was leaving the Conner residence. 11/18/13 RP 118. While the defendant testified he only saw the owner at the Conner residence, he did not testify that no one else was in the area. 11/18/13 RP 120.

From this evidence the parties presented two different theories of the case. The State argued that the defendant was acting as an accomplice to a burglary by acting as a lookout and getaway driver. 11/18/13 RP 126. The defense argued that the defendant was innocently in the area and had no connection to any burglary at Mr. Conner's home. 11/18/13 RP 127-129. These opposing theories required the court to make a credibility determination. If the court believed the defendant's account then it would acquit. If however it did not believe the defendant's account and instead believed Mr. Conner's testimony, then the evidence strongly showed that the defendant was in fact an accomplice to a burglary.

The court's oral decision indicates that the court did not find the defendant's version of events credible but rather found Mr. Conner's testimony credible. It could not have found the defendant guilty had it believed that the defendant was innocently in the area, unconnected with another person who had been ransacking the

Conner home at the same time that the defendant was parked in the Conner's driveway.

The only issue on appeal was whether the evidence was sufficient to support the defendant's conviction for residential burglary. The findings and supplemental findings were supported by the direct and circumstantial evidence presented at trial. As discussed in the State's initial response brief, if believed, the State's evidence was sufficient to find the defendant guilty. The court specifically found "the defendant's explanation for his behavior, including his reason for being in the area and the horn honking was not credible." 3 CP 96. That specific finding was implicitly made by the court when it found the defendant guilty of the charge. Like Hillman, the critical determination, whether the defendant's testimony was credible, was at least implicitly addressed in the court's oral decision. Since that determination did not change between the oral decision and the written findings the defendant has not shown the requisite prejudice necessary to warrant reversal.

The defendant states that the issue on appeal was whether there was sufficient evidence to prove that he had knowledge that his actions would promote or facilitate any crime. He argues that



prejudice resulted when the court entered a finding that “the defendant knew that the unknown person had entered the residence without permission to steal property inside the residence.” 1 CP 96. The defendant’s testimony did not address whether he knew there was someone burglarizing the Conner residence at the time he was parked in their driveway. Thus the only evidence on that point came from the circumstantial evidence the trial court found credible. An appellate court does not review credibility determinations. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The defendant is not prejudiced from entry of a finding that logically flows from the court’s credibility determinations.

The defendant also states that the trial court had failed to indicate in its oral decision whether it was relying on an accomplice theory of liability. Findings addressing this point did not prejudice the defendant for two reasons. First, there was no issue regarding what theory of liability was supported by the evidence. There was no evidence produced that the defendant acted as a principal and the State did not rely on that theory to argue the defendant was guilty. 11/18/13 RP 126. Whether the defendant was guilty or not rested solely on whether the defendant was an accomplice.

Second, accomplice and principle liability are not separate crimes. State v. Toomey, 38 Wn. App. 831, 840, 690 P.2d 1175 (1984), review denied, 103 Wn.2d 1012, cert. denied, 471 U.S. 1067 (1985). This is not like the case whereupon the defendant challenged the sufficiency of the evidence to one crime on appeal, and while the appeal was pending the trial court entered findings on a different charge that was supported by the evidence. State v. Pruitt, 145 Wn. App. 784, 187 P.3d 236 (2008). Here, the court found the defendant guilty of a single crime, burglary. The late findings did not deviate from the court's original oral decision in that regard.

Finally, the defendant blames the court and the State for error in failing to timely enter findings and conclusions. To be sure the court and the State do share some blame in this regard. However, the defendant also had a role in this error. He could have brought it to the trial court's attention that it had not complied with the requirements of CrR 6.1(d) at any time before he filed his opening brief. He did not do so. Generally a party is precluded from raising an issue on appeal unless it meets the requirements of RAP 2.5. The purpose of that rule is to ensure the trial court has the opportunity to correct any errors and thereby avoid


unnecessary appeals. State v. Robinson, 171 Wn.2d 292, 304-305, 253 P.3d 84 (2011). The purpose of that rule equally applies here. Had the defendant raised the issue at the trial court level the trial court would have had the opportunity to correct the error.

### **III. CONCLUSION**

For the forgoing reasons the defendant has failed to show that he was prejudiced when the court entered late findings of fact and conclusions of law. For that reason and the reasons set out in the State's initial response brief the State asks the Court to affirm the defendant's conviction.

Respectfully submitted on January 5, 2015.

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THE STATE OF WASHINGTON,  
  
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AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 6<sup>th</sup> day of January, 2015, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

THE COURT OF APPEALS - DIVISION I  
ONE UNION SQUARE BUILDING  
600 UNIVERSITY STREET  
SEATTLE, WA 98101-4170

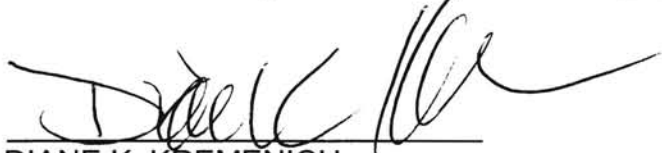
WASHINGTON APPELLATE PROJECT  
1511 THIRD AVENUE, SUITE 701  
SEATTLE, WA 98101

containing an original and one copy to the Court of Appeals, and one copy to the attorney for the appellant of the following documents in the above-referenced cause:

SUPPLEMENTAL BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 6<sup>th</sup> day of January, 2015

A handwritten signature in black ink, appearing to read 'Diane K. Kremenich', written over a horizontal line.

DIANE K. KREMENICH  
Legal Assistant/Appeals Unit